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Are We Family?: Lesbian Rights and Women's Liberation

ARE WE FAMILY?: LESBIAN RIGHTS AND WOMEN'S LIBERATION[©]

BY DIDI HERMAN*

I. INTRODUCTION

In 1985, library worker Karen Andrews began her struggle for family coverage under the Ontario Health Insurance Plan (OHIP). She wished to have herself, her partner, and the children they co-parented deemed a "family" for the purposes of health benefit legislation; doing so would reduce the premiums they were each liable to pay. Since then, her efforts have resulted in a report from the Ontario Ombudsman's Office recommending OHIP coverage for lesbian and gay couples,¹ a Supreme Court of Ontario decision rejecting the recommendation,² and the development of a supporting campaign within the lesbian and gay communities using the theme *We Are Family*. The case is currently under appeal.

Karen Andrews' struggle is part of a broader lesbian and gay rights movement that has arisen in western capitalist countries within

[©] Copyright, 1989, Didi Herman. Ms Herman was a member of the Osgoode Hall Law School graduating class of 1989. She was awarded a Tory, Tory, DesLauriers & Binnington writing award for this article.

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¹ Ontario. *Report of the Ombudsman's Opinion, Reasons Therefore, and Recommendation Following His Investigation Into the Complaint of Ms. Karen Andrews* (20 February 1987, File No. 47699).

² *Andrews v. Ontario (Minister of Health)*, [1988] 9 C.H.R.R. D/5089, 49 D.L.R. (4th) 584, C.L.L.C. 16191, (Ont. H.C.) [hereinafter *Karen Andrews* cited to C.L.L.C.].

the last two decades. Lesbians and gay men have come to rely on legal mechanisms as an offensive strategy aimed at securing their rights as homosexuals. Much of the resulting discourse has centred on notions of what constitutes "family," including definitions and potential meanings of words like "spouse" and "marriage." I believe it is necessary to step back and reflect critically upon this strategy, particularly for those of us who, as socialists and feminists, tend to evaluate reform initiatives in terms of their revolutionary potential (that is, for the liberation of peoples of colour, women, and the working class).³

The politics of lesbian and gay rights raises certain questions. For example, have we moved from a discourse of liberation to one of rights, and if so, what are the implications? Are our movements in danger of being depoliticized or of losing their radical potential? What happens when lesbians attempt to appropriate familial ideology? Are lesbian families inherently radical? Can there be such a thing as a lesbian family? When we call ourselves families or spouses, and perhaps win this recognition from legal institutions, are the meanings of these words radicalized or are we simply accommodating ourselves to existing structures and ideologies without subverting them? Does the ability of state structures to accommodate us, in turn, simply reinforce their power in our lives? How do our legal arguments fit in with feminist theories of the social construction of gender and sexuality? Do popular notions of immutability, and their reflection in the form of legal argumentation, remove the possibilities of liberating choice for women, denying us roles as active agents concerning our own sexuality? This paper will use the Karen Andrews litigation as a starting point to examine the

³ Elizabeth Schneider asks a series of questions I have found useful to focus this issue: "Does the use of legal struggle generally and rights discourse in particular help build a social movement? Does articulating a right advance political organizing and assist in political education? Can a right be articulated in a way that is consistent with the politics of an issue or that helps redefine it? Does the transformation of political insight into legal argumentation capture the political visions that underlie the movement? Does the use of rights keep us in touch with or divert us from consideration of and struggle around the hard questions of political choice and strategy? Does it keep the movement passive or help it begin to act? Does it help the movement to determine what it really wants? Does it limit or constrain the movement's vision of what might be possible?" See E. Schneider, "The Dialectic of Rights and Politics: Perspectives from the Women's Movement" (1986) 61 N.Y.U. L. Rev. 589 at 622-23.

increasing use of law by lesbians and gay men. In the process, although the above questions will be far from resolved, the discussion may encourage further analysis and reflection.

II. THE POLITICS OF FAMILY

Karen Andrews initially began her struggle for family OHIP coverage by attempting to use the grievance procedure contained in her collective agreement. She argued that her employer's refusal to extend the health benefit amounted to sexual orientation discrimination, which was specifically prohibited in the agreement.⁴ It took one and a half years for the parties to settle on an arbitration panel. Subsequently, the grievance became even more bogged down in bureaucratic and legalistic red-tape.⁵ Andrews eventually filed a complaint with the Office of the Ontario Ombudsman who quickly released a report supporting her claim.⁶ The government refused to implement the Ombudsman's recommendations, and Andrews chose to commence the current litigation.⁷

Andrews asked the Ontario Supreme Court to overturn the government's "heterosexuals only" interpretation of "spouse" under the *Health Insurance Act* regulations (by this point, the employer had acceded to Andrews' request, and the only obstacle that stood in the way was the Ministry of Health's refusal to authorize extension of the benefits).⁸ The regulations themselves did not define the term "spouse." However, the Ministry insisted that only heterosexual couples were included. Andrews' application requested, among other

⁴ K. Andrews, Address (Osgoode Hall Law School, York University, 22 February 1989) [unpublished].

⁵ *Ibid.*

⁶ *Report of the Ombudsman's Opinion, supra*, note 1.

⁷ Andrews chose to apply directly to the Ontario Supreme Court rather than to the Ontario Human Rights Commission, since she was advised that the matter was one of legal interpretation and would ultimately end up in the courts on appeal anyway; see *supra*, note 4.

⁸ *Health Insurance Act*, R.S.O. 1980, c.197, R.R.O. 1980, Reg. 452, ss.1 & 37(1)(i).

things, a declaration that the exclusion of lesbian and gay partners from the term "spouse" was contrary to sections 1 and 4 of the *Human Rights Code* and to sections 2, 7, and 15 of the *Canadian Charter of Rights and Freedoms*.⁹

Justice McCrae of the Ontario Supreme Court declined to make such a declaration. McCrae J. found that the term *spouse* did not include homosexual partners. In his reasons for judgment, he cited numerous Ontario statutes and various dictionaries, all of which defined spouse as a person of the opposite sex.¹⁰ Following *Blainey v. Ont. Hockey Association*,¹¹ he refused to take jurisdiction on the *Human Rights Code* claim, stating that such matters were to go the Human Rights Commission at first instance. With respect to section 15 of the *Charter*, McCrae J. applied the pre-*Andrews v. Law Society* "similarly situated" test.¹² According to McCrae J., lesbians and gay men fail this test because of their inability to marry and procreate.¹³ Further, he found that the exclusion of homosexual couples was not discriminatory since such couples were treated no differently than any other "combination" of single persons living together.¹⁴ Finally, under section 1, the government's interpretation of spouse was

⁹ *Karen Andrews, supra*, note 2; Applicant's Factum to the Supreme Court of Ontario, at 2-3. *Human Rights Code, 1981*, S.O. 1981, c.53, s.1: "Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of ... sexual orientation ..." Section 4 states: "Every person has a right to equal treatment with respect to employment without discrimination because of ... sexual orientation ..." *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*]. Section 15(1) will be the only provision discussed in this paper: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

¹⁰ *Karen Andrews, supra*, note 2 at 16192-93.

¹¹ *Blainey v. Ont. Hockey Assoc.* (1986), 54 O.R. (2d) 513 (C.A.).

¹² The Supreme Court of Canada in *Andrews v. Law Society (B.C.)*, [1989] 1 S.C.R. 143, [1989] 2 W.W.R. 289 [hereinafter *Law Society*] has rendered a strict "similarly situated" test obsolete. This test gave equal application of section 15 to those groups deemed to share a like position before the law in question. See text, *infra* at 810-814.

¹³ *Karen Andrews, supra*, note 2 at 16193.

¹⁴ *Ibid.* at 16194.

viewed as being "economically practical" and related to the important objective of "establishing and maintaining traditional families."¹⁵

The decision in *Karen Andrews* was generally consistent with the law in this area (the recent case of *Mossop v. Dept. of Sec. State (Can.)*, which adopts a very different analysis, will be discussed further below).¹⁶ In *Vogel v. Manitoba*, a Manitoba human rights board of adjudication looked to dictionary definitions of spouse to deny a gay partner workplace dental plan coverage.¹⁷ In a similar, more recent Ontario labour arbitration case, the Board used the "opposite sex" definition of spouse in section 9(1)(j) of the *Human Rights Code* to bypass the *Code's* sexual orientation discrimination prohibition under sections 1 and 4.¹⁸ In another case, a Quebec labour arbitration board refused to find that a lesbian partner was "immediate family" for the purposes of a special leave provision in the collective agreement.¹⁹ The employee's partner could not be considered a "common-law spouse" since the women were unable to legally marry.²⁰

In 1989, a very different conclusion was reached by a Canadian Human Rights Tribunal in *Mossop*.²¹ Here, adjudicator M.E. Atcheson held that a collective agreement provision was in breach of the *Canadian Human Rights Act* for denying to lesbians and gay men a bereavement leave benefit for deaths in a partner's

¹⁵ *Ibid.*

¹⁶ *Mossop v. Dept. of Sec. State (Can.)*, [1989] C.L.L.C. 16041 (C.H.R.T.) [hereinafter *Mossop*].

¹⁷ *Vogel v. Manitoba* (1983), 4 C.H.R.R. D/1654 (Man. Bd. Adj.) [hereinafter *Vogel*].

¹⁸ *Re Carleton University and CUPE* (1988), 35 L.A.C. (3d) 96 (Ont. Arb. Bd.) [hereinafter *Re Carlton*]. Section 9(1)(j) of the *Code* reads: "'spouse' means the person to whom a person of the opposite sex is married or with whom the person is living in a conjugal relationship outside marriage."

¹⁹ *C.U.P.E. v. Canada Post* (27 March 1986), Montreal 86-4-C-11 (Can. Arb. Bd.).

²⁰ *Ibid.* at 9. With regard to support obligations, see also *Anderson v. Luoma* (1984), [1985] 42 R.F.L. (2d) 444 (B.C.S.C.), 50 R.F.L. (2d) 127 (B.C.S.C.).

²¹ *Mossop*, *supra*, note 16.

family.²² The *Act's* definition of "family" was interpreted to include lesbian and gay relationships. The Tribunal expressly rejected relying on "general understandings" or "historical roots," arguing that "terms ... must be tested in today's world, against an understanding of how people are living and how language reflects reality."²³ The result in this case is a marked departure from the law in this area.²⁴

Mossop may signal an increased willingness of lawmakers to take account of the reality of lesbian and gay existence, but this case remains, for now, an anomaly. For the most part, definitions of spouse and family continue to be based on the ability to marry and procreate. This reflects an absurd Catch-22 situation for lesbians and gay men who are denied the ability to marry since our relationships cannot be considered spousal. A lesbian or gay marriage cannot, by definition, qualify as marriage at all.²⁵ Biology and dictionaries combine to assert only one possible meaning to these concepts.²⁶ Are judges and other decision-makers wrong to find that the institutions of family and marriage necessarily exclude lesbians and gay men? Are the results in these cases *bad law*?

Virtually all family/spousal lesbian and gay litigation till now has proceeded from a "sameness" model of analysis. The lesbian or gay claimant attempts to demonstrate that their intimate relationship is qualitatively no different from that of the paradigmatic heterosexual couple. For example, Karen Andrews argued that she and her partner

²² *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, ss. 7(b) & 10(b) [hereinafter *Act*]. The discrimination alleged was based on the 'family status' ground in the *Act*.

²³ *Mossop*, *supra*, note 16 at 16057.

²⁴ After this article was completed, *Mossop* was overturned by the Federal Court of Appeal (29 June 1990, court file A-199-89).

²⁵ See *North v. Matheson*, [1976] 20 R.F.L. 112 (Man. Co. Ct.); *Jones v. Hallahan*, 501 S.W. 2d 588 (Ky. 1973); *Adams v. Howerton*, 673 F.2d 1036 (9 Cir. 1982); *Singer v. Hara*, Wash. App., 522 P.2d 1187 (Wash. C.A. 1974); *Baker v. Nelson* 291 Minn. 310, 191 N.W. 2d 185 (Minn. Sup. Ct. 1971), appeal dismissed, 409 U.S. 810 (1972).

²⁶ Similar decisions have been reached at the European Court of Human Rights. See for example, *Rees v. U.K.* (1987), 9 E.H.R.R. 56 at 61 and *App. No. 9369/81 v. U.K.* (1983), 5 E.H.R.R. 581. For a discussion of the right to privacy under international human rights law, see P. Girard, "The Protection of the Rights of Homosexuals Under the International Law of Human Rights: European Perspectives" (1986) *Can. Hum. Rts Y.B.* 3.

regard themselves and hold themselves out to the community as each other's spouse and intend to continue to live together as each other's spouse. Andrews and Trenholm are each other's sole domestic and sexual partners, own their home as joint tenants, have their assets in a joint bank account and have named each other as beneficiary under their wills.²⁷

The gay grievor in *Re Carleton* stated that he and his partner

are each other's sole domestic and sexual partners; spend their holidays and vacations together; share the common necessities of life; share all household responsibilities; and are economically interdependent ... [they] hold themselves out to the community as each other's spouse and intend to continue to live as each other's spouse.²⁸

The description of these relationships resembles remarkably that of the traditional family form (or at least its ideal).²⁹ Up to this point, however, few decision-makers have accepted the analogy. What are the implications of lesbians and gay men employing familial ideology to found rights claims? What might it mean if such arguments come to be accepted in legal forums?

A number of feminist theorists have identified the capitalist family formation as a primary site of women's economic and ideological oppression. Michele Barrett and Mary McIntosh have written that this family is a "vigorous agency of class placement and an efficient mechanism for the creation and transmission of gender inequality ... [it is] the focal point of a set of ideologies that resonate

²⁷ See Applicant's Factum, *supra*, note 9 at 3. Karen Andrews' factum does not use the word "lesbian" at any time. This was a strategic decision made by Andrews' lawyers. See Address, *supra*, note 4.

²⁸ *Re Carleton*, *supra*, note 18 at 98. See also S. Gnutel, "Not A Real Family, YMCA Rejects Lesbian Couple's Request For Family Status" *Xtra* (17 March 1989) 5: "they have been partners for four years ... own a business and a house together, and function in all ways as a social and economic unit."

²⁹ See Margrit Eichler's discussion of the definition of "family" in *Families in Canada Today: Recent Changes and Their Policy Consequences* (Toronto: Gage Publishing, 1983) at 3-9. Eichler submitted an affidavit in support of Karen Andrews in which she concluded that "Karen Andrews and Mary Trenholm, and her [*sic*] children, should be regarded as a familial unit. The only basis for distinguishing Karen Andrews and Mary Trenholm from cohabitating heterosexual couples who receive dependent coverage, is the fact that they are of the same sex ... sexual orientation *per se* is not a useful basis for determining eligibility for social benefits ... " *Karen Andrews*, *supra*, note 2, Affidavit of Dr. Margrit Eichler at 4 (see court file no. 170-88).

throughout society."³⁰ They argue that the major significance of the family in capitalist societies today is ideological, and that its material basis has been largely undermined by developing economic conditions.³¹ Thus, the material reality of how people live is in contradiction with the ideology. At the same time, familial ideology itself devalues the lives of those who do not fit its ideal.³²

Carol Smart argues that the family constitutes "one instance of the operation of patriarchal relations in the concrete."³³ The family as an institution is structured upon male domination of women in the sexual, reproductive, and labour spheres. Marriage, then, is a "tie that binds," the "cornerstone and the mechanics of the reproduction of family across generations."³⁴ With respect to the relationship between family and law, Smart suggests that

law is a valid area for critique and reform because law both celebrates and sustains a particular family form, it privileges marriages above all other relationships (including parenthood) and it consequently constitutes a major obstacle to any fundamental change to the organization of our domestic lives.³⁵

Similarly, Shelley Gavigan argues that law defines and re-enforces the meaning of family as ideology; she suggests that this may be a more important area of inquiry than studying the unequal treatment of women under family law.³⁶

These theorists contend that hegemonic familial ideology is a primary contributor to the oppression and exploitation of women. They argue that there is little point in constructing oppositional familial ideologies because the family form is itself inextricably tied to class and gender relations of power. For Barrett and McIntosh,

³⁰ M. Barrett & M. McIntosh, *The Anti-Social Family* (London: Verso Editions, 1982) at 29.

³¹ *Ibid.* at 33-34.

³² *Ibid.* at 77-80.

³³ C. Smart, *The Ties That Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (London: Routledge & Kegan Paul, 1984) at 10-11.

³⁴ *Ibid.* at 144-45.

³⁵ *Ibid.* at 221.

³⁶ S.A.M. Gavigan, "Law, Gender and Ideology" in A.F. Bayefsky, ed., *Legal Theory Meets Legal Practice* (Edmonton: Academic Printing and Publishing, 1988) 283 at 293-94.

a central feature of the feminist project is, thus, to ensure that the needs met practically and ideologically by this institution be met socially in an *unprivatized* form.³⁷ Smart explicitly argues against lesbians and gay men seeking admission to dominant definitions of family relations:

A primary goal must be to jettison the privileged status of the heterosexual married couple, but not in order to create a different hierarchy of *unmarried* households. The aim is not to extend the legal and social definition of marriage to cover cohabitantes or even homosexual couples, it is to abandon the status of marriage altogether and to devise a system of rights, duties, or obligations which are not dependent on any form of *coupledness* or marriage or quasi-marriage.³⁸

Given this analysis, the courts have been right, thus far in their assessment of lesbian and gay rights claims. Our relationships simply cannot be family, because family necessitates the productive, reproductive, and sexual exploitation of women by men. Our ceremonies of commitment cannot be marriages because marriage is the legal tie binding women to family. And the word "spouse" cannot include us because its meaning must be derived from the legal relationship that has historically defined women's subordination within family, which is marriage. In this sense, judges know with subjective intuition what feminist theorists explain with objective analysis. By appropriating familial ideology, lesbians and gay men may be supporting the very institutional structures that create and perpetuate women's oppression. Our reliance on the language of monogamy, cohabitation, life-long commitment, and other essentials of *bona fide* heterosexual coupledness may divide us, not only from other lesbians and gays who do not live in this fashion, but from all people defined as "single" by virtue of their exclusion from the model.

This case was painfully illustrated in the *Karen Andrews* litigation when sociologist Margrit Eichler was cross-examined by the government's lawyer. In her supporting affidavit, Eichler had concluded that Andrews and Trenholme's relationship satisfied a "dimensional" definition of family.³⁹ The cross-examination was

³⁷ Barrett & McIntosh, *supra*, note 30 at 134, 155-59.

³⁸ Smart, *supra*, note 33 at 146.

³⁹ See *Karen Andrews*, *supra*, note 2, affidavit of Dr. Margrit Eichler.

intended to suggest that her definition was overly broad.⁴⁰ Simply, the government attempted to throw up the red "floodgates" flag. A series of hypothetical living situations were put to Eichler and she was pushed to agree that they all might qualify as families under her approach. Andrews' lawyer felt he had to undo this damage and conducted a re-direct examination. The following exchange took place:

Q: Mr. Charney asked you numbers [*sic*] of questions with respect to various arrangements - I'll call it arrangements - and I had understood you to say that the facts would have to be - some subjective facts may have to be considered. The example that he put to you of a sister/sister relationship, living together, would you view that as a spousal-like relationship for the purposes of OHIP coverage?

A: No, because there is a possibility of a sexual relationship absent altogether, and "Spouse" implies that there is the - there may not in fact be a sexual relationship, because we know that in certain couples there isn't, but there is the possibility, and it's assumed that that is one of the activities that a couple engages in.

Q: He also gave you the example of a heterosexual couple who are living together in the absence of any sexual relationship, and I understood what you said with the question of permanent - or the intention of permanence - but would you view that as a spousal-like relationship?

A: If there's no intention ever to have a sexual relationship -

Q: I think that was his premise.

A: - no. I would not define it as a couple, because that is part of the definition, the possibility of a sexual relationship ... you would not use the term "Couple" if there is no possibility or assumption that this would ever transpire.

Q: Just to be clear, you've used the term "Couple," and Mr. Charney has used the term "Family," and I'm going to use the term "Spousal-like relationship."

A: Spousal-like?

Q: Yes.

⁴⁰ *Ibid.* See transcript of cross-examination of Dr. Margrit Eichler at 3-23.

A: Spousal-like would be a fine description in terms of a homosexual or heterosexual couple.

Q: And in terms of this heterosexual couple who are living together, and there is no intention of sexual relationship; would they fit within the definition of a "Spousal relationship," within the context of OHIP, that we've been discussing?

A: No.⁴¹

What are we to make of this? Surely it is extremely problematic for feminists and socialists to support a lesbian rights struggle which argues that the essence of family, and therefore of entitlement to state benefits, is the "possibility" of a sexual relationship between the members. At a practical level, many people would be disentitled simply because they do not engage in sexual activity with other members of their households. At a theoretical level, how do we determine what is "possible"? How do we define what constitutes a "sexual relationship"? And by reference to what norms do we decide that there is no "possibility" of a "sexual relationship" between two heterosexually-identified women or men living together? It would seem that this type of argument reinforces rather than subverts the traditional form of family and a family status basis of entitlement to benefits. By claiming our rights as spouses, rather than our rights/needs as people, we emulate and legitimize the ideological norm and we also compound the marginalization of others.

There have, however, been a number of critical responses to this feminist critique of family. In recent years, some of the assumptions underlying this analysis have come under increasing attack. Much of the criticism has been initiated by feminists writing out of their experience as women of colour. These theorists argue that a general *anti-family* politic is implicitly racist and such discourse cannot take account of how family can be a source of strength, affirmation, and resistance for people who experience racial oppression.

Floya Anthias and Nira Yuval-Davis, for example, have suggested that white, western feminists' generalizations about family

⁴¹ *Ibid.* at 24-25

are accultural and that "family may *not* be the or even a major site of women's oppression when families are kept apart by occupying or colonizing forces."⁴² Hazel Carby argues that in capitalist societies, "the Black family has been a site of political and cultural resistance to racism," and that ideologies of Black womanhood have been constructed primarily through labour and not family relations.⁴³ Others contend that, far from overthrowing the family, what is needed is a movement to save the non-white family from obliteration resulting from the implementation of neo-conservative economic policies.⁴⁴

When these writers use the term "family," they mean something quite different from the ideological construct critiqued by Barrett and McIntosh, Smart, and Gavigan. Harriet Michel suggests that

[b]ecause slavery often denied us the right to live with our biological kin, our definition of family became any group of individuals who collectively come together in order to provide economic and emotional support to the members of the groups.⁴⁵

Jewelle Gomez has specifically taken issue with lesbian and gay anti-family discourse:

the Civil Rights movement was a family movement. For most Afro-Americans the idea of separating from family is appalling and possibly fatal. The family (not the nuclear thing "they" talk about, but our family as we construct it) is our survival mechanism, and few of us would be willing to relinquish it. It is impossible for us to imagine moving forward without our families.⁴⁶

⁴² F. Anthias & N. Yuval-Davis, "Contextualizing Feminism - Gender, Ethnic and Class Divisions" (1983) 15 *Feminist Rev.* 62 at 72. See also, "Constitutional Guidelines for a Democratic South Africa," Article (V) (the family), (Lusaka: African National Congress).

⁴³ H. Carby, "White Woman Listen! Black Feminism and the Boundaries of Sisterhood" in *The Empire Strikes Back: Race and Racism in 70s Britain* (London: Hutchinson, 1982) at 214-15.

⁴⁴ H.R. Michel, "The Case for the Black Family" (1987) 4 *Harv. Blackletter J.* 21 at 24: "All persons of good conscience should actively advocate those policies that will strengthen families ..."

⁴⁵ *Ibid.* at 21.

⁴⁶ J. Gomez, "Repeat After Me: We Are Different, We Are the Same" (1986) 14 *N.Y.U. Rev. L. & Soc. Change* 935 at 939.

For our purposes, it might be useful to ask whether there are parallels here to notions of a radical lesbian or gay family. If there is validity to the claim that the "Black family" is a site of resistance and affirmation, perhaps this idea can be imported into this discussion (the non-white family and the lesbian/gay family are, of course, not mutually exclusive categories).

A number of lesbian and gay writers have explicitly argued that lesbian and gay families are qualitatively different from heterosexual families and, as such, are inherently subversive. Richard Goldstein has put it this way:

The gay family is short-hand for a new institution; one that bears little resemblance to the patriarchal structure most of us were raised in. Homosexuals are, by definition, outside that structure, and given our status, when we try to appropriate the tradition of forming families, we end up creating something new.⁴⁷

Baba Copper invokes the concept of "lesbian mothering" to suggest that lesbian motherhood "embodies a remarkable chance to redesign woman's primary biologically-based role in the service of woman-chosen goals."⁴⁸ At the 1987 *March on Washington for Lesbian and Gay Rights*, one of the featured actions was a mass wedding ceremony to celebrate "the relationships of hundreds and perhaps thousands of same-sex couples."⁴⁹ One lesbian rights lawyer described this scene as "incredibly subversive."⁵⁰

Lesbian and gay communities do not, however, present a monolithic opinion on this issue. Nancy Polikoff argues that there is nothing inherently radical about lesbian/gay families and that the question of whether our households pose a challenge to heterosexual institutions is rooted in how we live our lives.⁵¹ She suggests that

⁴⁷ R. Goldstein, "The Gay Family, Motherhood, Fatherhood, and Selfhood, The Bond That Ties" *Village Voice* (1 July 1986) 19 at 24.

⁴⁸ B. Copper, "The Radical Potential in Lesbian Mothering of Daughters" in S. Pollack and J. Vaughn, eds, *Politics of the Heart: A Lesbian Parenting Anthology* (Ithaca: Firebrand Books, 1987) 233 at 240.

⁴⁹ *March on Washington For Lesbian And Gay Rights, October 11, 1987* (leaflet).

⁵⁰ Conversation with Roberta Achtenberg, lawyer with the Lesbian Rights Project, San Francisco (18 February 1989).

⁵¹ N. Polikoff, "Lesbians Choosing Children: The Personal is Political Revisited" in *Politics of the Heart*, *supra*, note 48 at 48.

lesbian mothers who do not publicly identify themselves as lesbians "assume a public position of heterosexuality,"⁵² and that there is nothing fundamentally radical about this:

Motherhood is an institution. It functions as an integral part of patriarchal society to maintain and promote patriarchy. Our lesbianism does not negate or transform the institution of motherhood. Motherhood, like marriage, is too loaded with this patriarchal history and function to be an entirely different phenomenon just because lesbians are doing it.⁵³

But this approach may be overly functionalist. Families are sites of contradiction; the very word means different things to different people. And there would seem to be more than one familial ideology. Perhaps lesbian families hold a different kind of potential than do gay male ones.

On the other hand, we can insist, like Barrett and McIntosh, that what we need is a new society, not new forms of family.⁵⁴ The material and emotional needs met today by family and familial ideology should be met socially and be unprivatized. However, the current economic and political climate does not give one much hope that the state will assume the provision of such needs. Indeed, the 1980's witnessed the retreat of many western states from principles of welfare capitalism. Thus, one could respond to Barrett and McIntosh's "come the revolution approach" with a great deal of skepticism.⁵⁵ But do we then, like lesbian rights lawyer Roberta

⁵² *Ibid.* at 53.

⁵³ *Ibid.* at 54.

⁵⁴ Barrett & McIntosh, *supra*, note 30 at 158-59: "What is needed is not to build up an alternative to the family – new forms of household that would fulfil all the needs that families are supposed to fulfil today – but to make the family less necessary, by building up all sorts of other ways of meeting people's needs, ways less volatile and inadequate than those based on the assumption that 'blood is thicker than water.'" Barrett and McIntosh offer suggestions, such as the following, in order to make the family "less necessary": higher wages, better welfare, family law reform, and avoidance of marriage. See at 140-43, 155. Carol Smart urges withdrawing privileges currently given to married heterosexuals, abolishing illegitimacy, and extending state benefits on the basis of need or contribution not 'family status'. Smart, *supra*, note 33 at 145-46.

⁵⁵ The kind of society Barrett and McIntosh envision seems pretty far down the road. Also, there is little evidence that women (much less lesbians and gay men) are much better off *as women* under existing socialist systems or that 'family' is any less of a fundamental institution despite the implementation of some of the reforms advocated by these theorists. See, generally, Barrett & McIntosh, *supra*, note 30.

Achtenberg, contend that subversion lies in the expansion of meaning accorded to terms like family and marriage?

To force systems like the legal system to accommodate, to change, to capitulate, to recognize the existence of rights for any despised group is to reshape the perceptions of who that group is and how much their existence is valued or their plight is of concern to the collective conscience. Changing the law to make it fit and serve the lives as actually lived of lesbians and gay males is a symbolically significant way of resisting the derogatory characterizations now fostered by the existing symbols.⁵⁶

Achtenberg seems to be arguing that law reform is part of an ideological battle, and that fighting over the meanings of marriage and family constitutes resistance to heterosexual hegemony. Can her approach be reconciled with Smart's call to feminists to resist marriage as "an important feminist strategy" and her explicit condemnation of tactics aimed at extending "the legal and social definition of marriage to cover cohabitees or even homosexual couples"?⁵⁷ Do the positions of Achtenberg and Smart reveal deep-seated theoretical differences or are they reflective of the different priorities of lawyers and academics?

One could conclude that the response to the experience of oppression cannot lie in a retreat into family, whatever the form, and certainly not into the discourse of familial ideology. Our families may be different in that they are not premised on the subordination of women by men. Yet, even if we assume that lesbian or gay families are so different or radical (and these are by no means the same thing), the ability of existing structures to accommodate us is done at the expense of women as a whole. We gain entry into the institutions, and (if we win our cases) thereby further entrench these institutions in law. Does this expand overall choice for women? We must also reconcile ourselves with the reality that for some, families and oppositional familial ideologies

⁵⁶ R. Achtenberg, *A Brief Essay on the Impact of Law On Ideology As It Relates to Lesbians and Gay Men in the United States* [unpublished] at 3.

⁵⁷ Smart, *supra*, note 33 at 146. Carol Smart now argues the need for feminists to engage with law as discourse, to expose law's pretensions to truth and thus to undermine its power (as opposed to contributing to its discursive hegemony through law reform strategies). See C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989). This is an approach I am pursuing further in doctoral research.

are important sites of resistance and affirmation. "Resisting marriage" may not necessarily be a radical strategy for all women.

Perhaps I have not even begun to address the more significant questions. How, for example, do we determine what ideologies and practices are radical rather than reactionary? What is the relationship between intent and effects? And how do we assess the impact of contradictory effects at the end of the day? A somewhat related debate is currently being played out in legal "rights debate" discourse. It may be useful to temporarily shift gears and look at lesbian and gay rights claims in this broader context.

III. THE POLITICS OF RIGHTS

In recent years, the efficacy of rights-based litigation has been the subject of heated debate. American academics associated with the Critical Legal Studies (CLS) school have developed a "critique of rights."⁵⁸ Canadian socialists have also pronounced negatively on rights claims in the context of *Charter* litigation.⁵⁹ The essence of the CLS critique is that rights claims perpetuate the dichotomy between individual and community.⁶⁰ Rights discourse seizes on what separates the individual from the group and thereby inhibits the development of social movements. Such discourse further promotes a kind of false consciousness, a belief that rights are

⁵⁸ See, generally, P. Gabel, "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves" (1984) 62 Tex. L. Rev. 1563; P. Gabel & P. Harris, "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law" (1982-1983) 11 N.Y.U. Rev. L. & Soc. Change 369; D. Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 Buffalo L. Rev. 209; M. Tushnet, "An Essay on Rights" (1984) 62 Tex. L. Rev. 1363.

⁵⁹ For example, M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989) [hereinafter *Legalization of Politics*]; M. Mandel, "Marxism and the Rule of Law" (1986) 35 U.N.B.L.J. 7; H.J. Glasbeek & M. Mandel, "The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms" (1984) 2 Socialist Studies/*Etudes Socialistes* 84; J. Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485.

⁶⁰ *Supra*, note 58.

ends-in-themselves.⁶¹ Rights not only become reified, but people become dependent on the state (including the courts) to grant them rights that are essentially formal and unsubstantive.

In the Canadian context, Marxist writers have argued that the enactment of the *Charter* has accomplished a similar result.⁶² Glasbeek and Mandel, for example, suggest that the form of many *Charter* rights is abstract, liberal, subject to enormous variation in interpretation, and essentially without content. This has contributed to an overall legalization of political discourse. Abstract rights discourse turns conflicts of interests into conflicts of rights: "the legal technique actually *obscures* [political] issues by dealing with them in abstractions that are meant to disguise the political nature of the choices being made."⁶³ Seeking unsubstantive equality obfuscates an understanding of actual social relations. Political struggles are thus de-politicized through their mediation by law. Mandel and the CLS school share the view that promises of abstract rights are a "hoax."⁶⁴ Such discourse is seen to constitute a form of legitimation, and its growing popularity a "change in the nature of legitimation, not in what is legitimated" (that is, ruling class hegemony).⁶⁵

These critiques, while diverging on many important questions, both suggest that rights claims (at least those grounded in entrenched abstractions interpreted by a judicial elite) are anti-democratic and de-politicizing. They argue that social justice (or revolution) is better fought for in forums away from the courts, the judges, and the rhetoric of individualism.

In the United States, the CLS critique has generated a number of responses, primarily from people writing out of their

⁶¹ P. Gabel, "Reification in Legal Reasoning" in S. Spitzer, ed., *Research in Law and Sociology*, V. 3, (Greenwich: JAI Press, 1980) at 25.

⁶² Mandel, *Legalization of Politics*, *supra*, note 59.

⁶³ Glasbeek & Mandel, *supra*, note 59 at 87.

⁶⁴ Mandel, *Legalization of Politics*, *supra*, note 59 at 308.

⁶⁵ Glasbeek & Mandel, *supra*, note 59 at 103.

experience in the anti-racist and women's movements.⁶⁶ This work emphasizes the symbolic value of rights and attacks the rights-critics' minimization of concrete gains made through rights struggles. Indeed, these writers question the ability of primarily white, male academics to understand what it means to have been denied rights.⁶⁷ Although this debate has taken place in the American context, the arguments of the rights-defenders have relevance to the struggle at issue here.

Robert Williams has criticized analyses suggesting that people are fooled into "buying" rights discourse through the adoption of some form of false consciousness.⁶⁸ He suggests that rights-critics are confusing dreams with illusions; for peoples of colour, rights are strategic and instrumental, a way to "beat the system" or secure a "tangible benefit."⁶⁹ He argues that

[t]he frequent attacks by CLS on both rights and entitlement discourse represent direct frontal assaults on the sole proven vehicle of the European-derived legal tradition capable of mobilizing peoples of colour as well as their allies in the majority society.⁷⁰

Williams contends that, to peoples of colour, rights are phenomena, not concepts. Lack of rights is, thus, a lived experience.⁷¹ He asks,

⁶⁶ See, for example, M.J. Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) 22 Harv. C.R.-C.L. L. Rev. 323; Schneider, *supra*, note 3; P.J. Williams, "Alchemical Notes: Reconstructing Ideals From Deconstructed Rights" (1987) 22 Harv. C.R.-C.L. L. Rev. 401 [hereinafter *Alchemical Notes*]; R.A. Williams, Jr., "Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Colour" (1987) 5 L. & Ineq. 103 [hereinafter *Taking Rights*].

⁶⁷ *Taking Rights, ibid.* at 122-23: "It is far too easy for someone on a law professor's salary to offer open-ended reconstructive projects which may bring immense benefits to a future generation. Minority law professors, however, who enjoy the sinecurial comforts of an academic life, cannot afford the luxury enjoyed by our CLS colleagues of not speaking to the real and immediate needs of our respective peoples. The trust placed in us demands the highest fiduciary standards."

⁶⁸ *Ibid.* at 121-22.

⁶⁹ *Ibid.* at 121, 125-26.

⁷⁰ *Ibid.* at 121. See also Matsuda, *supra*, note 66 at 338-39.

⁷¹ See *Taking Rights, ibid.* at 123.

"what else could a right be other than an abstraction for someone who has never had their abstractions taken away or denied?"⁷²

Elizabeth Schneider and Patricia Williams focus on the symbolic value of rights struggles. Schneider discusses how rights formulations make sense to women on an experiential level and how such articulations reflect a feminist theory/practice dialectic.⁷³ Drawing from the work of Carol Gilligan, Schneider suggests that the public assertion of legal rights can "provide women with a sense of collective identity," and be a means of establishing self-hood.⁷⁴ Patricia Williams also addresses this notion of self-hood in the context of the Black Civil Rights movement:

The Black experience of anonymity, the estrangement of being without a name, has been one of living in the oblivion of society's inverse, beyond the dimension of any consideration at all. Thus, the experience of rights-assertion has been one of both solidarity and freedom, of empowerment of an *internal* and very personal sort; it has been a process of finding the self.⁷⁵

Rights claims can, thus, be both empowering and politicizing — quite the opposite result to that suggested by the rights critics.

The relevance of this debate to lesbian and gay liberation struggles should be apparent. On the one hand, our rights claims, and *Charter* litigation in particular, can be seen as part of the trend identified by Glasbeek and Mandel as the legalization of politics. John D'Emilio has argued that a shift in emphasis has taken place from the rhetoric of gay liberation to that of gay rights:⁷⁶

[gay liberation] employed a language of political radicalism. It saw itself as one piece of a much larger political impulse that strove for a complete reorganization of institutions, values, and the structure of power in American life. Gay liberation sought to achieve its aims by organizing masses of gay men and lesbians whose political activity would occur largely outside courts and legislatures. These activists

⁷² *Ibid.* at 125.

⁷³ Schneider, *supra*, note 3 at 648-52.

⁷⁴ *Ibid.* at 616-17. See C. Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982).

⁷⁵ *Alchemical Notes, supra*, note 66 at 414.

⁷⁶ J. D'Emilio, "Making and Unmaking Minorities: The Tensions Between Gay Politics and History" (1986) 14 N.Y.U. Rev. L. & Soc. Change 915. I would not want to make too much of this, but I find it interesting that the Toronto gay newspaper *The Body Politic*, upon its demise, was replaced by one called *Rites*.

viewed accepted categories of homosexuality and heterosexuality as oppressive social constructs.⁷⁷

Certainly, in Canada, there is an ever-increasing reliance on *Charter* litigation as a strategy for social change. "Charter-talk" has come to dominate the strategic political discourse of the lesbian and gay movement. The state is, in fact, encouraging the channeling of energies in this direction by funding the lesbian/gay *Charter* challenge organization, *Egale*.⁷⁸ Lesbian and gay community newspapers are currently full of stories about the latest rights case.⁷⁹ Significant resources are being concentrated in an effort to amend section 15 of the *Charter* to include "sexual orientation," perhaps to the exclusion of other strategies.⁸⁰ The necessities of conforming to the norms of legal argumentation may lead to the holding of unintended and potentially reactionary positions. Furthermore, the professionalization of lesbian and gay movements may be taking place as lawyers and legal academics *take over* setting agendas and defining terms of reference.⁸¹

On the other hand, one could argue that rights struggles have been a site of mobilization for lesbians and gays. The 1986 campaign to have a "sexual orientation" ground amended to the *Human Rights Code* was the focus of wide-spread organizing and

⁷⁷ *Ibid.* at 915.

⁷⁸ I am not suggesting that the state is lesbian and gay positive. I have explored elsewhere the impact of the New Right on the regulation of sexuality. See D. Herman, *Crisis, Containment, and Coercion: AIDS, the New Right, and the Social Construction of Disease in Canada* (Osgoode Hall Law School, York University, 1988) [unpublished].

⁷⁹ See, for example, Gnutel, *supra*, note 28 and current issues of *Xtra* and *Rites*.

⁸⁰ For example, there is no similar mass movement directed towards encouraging labour unions to remove heterosexual bias in collective agreements, to re-structure ineffective human rights code mechanisms, or to attack the transmission of compulsory heterosexuality in the school system. The question of whether legal rights' struggles challenge heterosexuality at all is discussed in text *infra*, at 812-13 and will be further explored in my doctoral research.

⁸¹ I also find two apparently contradictory trends interesting. On the one hand, I have perceived a growing marginalization of sexual identities thought to do the gay rights cause no good (i.e., butch/femme, drag queens, etc.). However, the focus on minority rights has at the same time contributed to the resurgence of sexual libertarianism as so-called sexual minorities (that is, sadomasochists, paedophiles, etc.) claim their rights as well.

coalition-building.⁸² This was, of course, a piece of lobbying not litigation; however, the discourse was one of equal rights. For many of us, the symbolic value of this victory was immense; the inclusion of a sexual orientation ground in the *Code* signified a recognition of our existence.⁸³

Karen Andrews herself has been a source of inspiration for many lesbians and gay men. Her example has encouraged others to "come out" and challenge their invisibility in law and policy.⁸⁴ Furthermore, her union's acceptance of the legal case has perhaps signalled a new openness within the labour movement. Throughout this process, Andrews has become a symbol in her own right. Thus, such individual cases may develop into larger campaigns waged on behalf of a collective.⁸⁵

Perhaps we need to retreat from an either/or position. Rights, like family, mean different things to different people. In assessing the efficacy of rights claims, it may be helpful to distinguish between various kinds of rights (not all are inherently abstract), their initiating processes, and the way a social movement takes up a particular rights struggle as a political mobilizer. We need to appreciate the particular circumstances where rights claims are necessary, strategic, and even empowering, and acknowledge that the acquisition of formal rights may be a pre-condition for more substantive or fundamental change. Yet, at the same time, we may need a heightened awareness of the pitfalls of rights discourse, particularly of the political implications of *Charter* litigation. We could also think more critically about how to integrate legal practice with radical theory.

⁸² D. Rayside, "Gay Rights and Family Values: The Passage of Bill 7 in Ontario" (1988) 26 *Studies in Political Economy* 109.

⁸³ Some of the problems associated with defining sexuality (that is, in terms such as "sexual orientation") are discussed in section IV, *infra* at 810ff.

⁸⁴ See the examples listed in *supra*, note 28.

⁸⁵ In the United States, Karen Thompson's struggle for access to and guardianship over her hospitalized partner is not only an example of this phenomenon, but also of how a rights struggle can politicize an individual. See K. Thompson & J. Andrzejewski, *Why Can't Sharon Kowalski Come Home?* (San Francisco: Spinsters/Aunt Lute, 1988).

IV. THE POLITICS OF SEXUALITY

To summarize thus far, I have attempted to subject the current, popular mode of lesbian and gay rights litigation to a measure of critical scrutiny. Some of the problems associated with such a strategy have been outlined. These problems include the potential for a reinforcement of oppressive institutions (that is, family, marriage) resulting from the employment of dominant ideological discourse. I have also suggested that sexual freedom struggles are de-politicized when one over-relies on law as a strategy for social change. The current lesbian and gay appropriation of familial ideology has been characterized as potentially undermining a long-term agenda for women's liberation. The ideology of rights claims as inherently progressive or good has been questioned. Yet, we have also seen that the family can be a source of identity affirmation and resistance. Many rights struggles have real practical and symbolic significance, and law itself is an important site of struggle. In the remaining pages, I want to raise a particular problem concerning the relationship between feminist theory and section 15 of the *Charter*. Hopefully, this will enlighten other areas of enquiry.

"Immutability" is central to section 15 analysis. Determining the immutability of a non-enumerated ground is the first step of the *Law Society* "enumerated and analogous grounds" approach.⁸⁶ It is the immutability of a non-enumerated ground that initially makes it analogous to those enumerated.

In *Law Society*, Justice McIntyre (whose dissent was accepted by the rest of the Supreme Court, with the exception of his section 1 application) threw out the old "similarly situated" test relied on by McCrae J. in *Karen Andrews*.⁸⁷ McIntyre J. accepted what he called the "enumerated and analogous grounds" approach to section 15. The test involves a consideration of (a) whether the alleged ground of discrimination is enumerated or analogous, (b) whether there is unequal treatment or differential impact, and (c) whether such

⁸⁶ See *Law Society*, *supra*, note 12.

⁸⁷ *Ibid.* at 300-3. See section II, *supra* at 791-92.

treatment or impact is discriminatory in the sense of imposing a burden.⁸⁸

With respect to the first branch of the test (which is the one at issue in this paper), both McIntyre J. and Wilson J. refer to the American concept of a "discrete and insular minority" as being the kind of group worthy of section 15 protection.⁸⁹ The entire court agreed that membership in such a minority was based on "personal characteristics."⁹⁰ The strongest statement in support of immutability doctrine was made by LaForest J. in a concurring majority opinion:

The characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs.⁹¹

Thus, in terms of sexuality, it is argued that sexual orientation is an immutable, personal characteristic and deserves inclusion in the section 15 list. Sexuality becomes an area beyond human agency.

Immutability is argued to be a characteristic of homosexuality by many lesbian and gay litigants.⁹² The position advanced is that we should not punish or tolerate discrimination against people who have no control over a *personal characteristic*. Sympathetic

⁸⁸ *Ibid.* at 314. I have elsewhere explored the possibility of analogizing sexuality with the enumerated ground of "religion" and the non-enumerated ground of "political creed."

⁸⁹ *Ibid.* at 315 (McIntyre J.); at 323-24 (Wilson J.).

⁹⁰ McIntyre J. stated: "Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits or capacities will rarely be so classed." *Ibid.* at 308. One might well ask whether lesbianism is a "personal characteristic" of women or a "capacity" (or, for that matter, a "merit")? Or whether these categories are as mutually exclusive as McIntyre J. makes them out to be? Although Wilson J. did not dispute this pronouncement, statements in her judgment (which primarily addressed the application of s.1 and which were concurred with by Dickson J. and L'Heureux-Dubé J.) were somewhat more open-ended, allowing, perhaps, for some social constructionist perspective. See *ibid.* at 323-25.

⁹¹ *Ibid.* at 330.

⁹² See for example, Appellant's Factum, *supra*, note 9 at 23-25; *Re Univ. of Sask. and Sask. Human Rights Com'n* (1976), 66 D.L.R. (3d) 561 (Sask. Q.B.) at 525 (the gay applicant argued that "a homosexual had an immutable sex characteristic over which he had no control"); *Watkins v. U.S. Army* 837 F.2d 1428 (9 Cir. 1988).

academics, writing in defence of the gay parent's right to child custody, emphatically state that, "it is well documented that sexual orientation is not a matter of choice."⁹³ The immutability framework conceives homosexuality and heterosexuality as either/or's — the concern is with the homosexual's biological inability to conform to the heterosexual norm. The norm itself is never questioned. Notions of immutability are informed by an essentialist theory of sexuality which posits that sexual orientations are accounted for by reference to a biologically and/or psychologically rooted "core of difference."

Opposed to this perspective is social construction theory.⁹⁴ Social constructionists contend that sexuality has historically consisted of acts with meanings. The meaning of these acts varies over time and place. They argue that the identity "homosexual" did not exist in capitalist countries prior to the latter half of the nineteenth century and arose out of the interaction of a number of economic and social forces:

Where essentialism took for granted that all societies consist of people who are either heterosexuals or homosexuals (with perhaps some bisexuals), constructionists demonstrated that the notion of "the homosexual" is a sociohistorical product, not universally applicable, and worthy of explanation in its own right. And where essentialism would treat the self-attribution of a "homosexual identity" as unproblematic — as simply the conscious recognition of a true, underlying "orientation" — constructionism focused attention on identity as a complex developmental outcome, the consequence of an interactive process of social labelling and self-identification. Finally, by refusing to privilege any particular expression of sexuality as "natural," constructionism shifted the whole framework of debate on the question of homosexuality: instead of asking, why is there homosexuality? the constructionists took variation for granted and asked, why is there homophobia?⁹⁵

At the root of essentialism, and hence notions of immutability, is the belief that a pre-given proclivity to particular sexual activity constitutes the basis of the categories heterosexual and homosexual.

⁹³ R.G. Bagnall *et al.*, "Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties" (1984) 19 Harv. C.R.-C.L. L. Rev. 497. See also R. Green, "The Immutability of (Homo)sexual Orientation: Behavioural Science Implications for a Constitutional (Legal) Analysis" (1988) 16 J. Psych. & L. 537, concerning the American "equal protection doctrine."

⁹⁴ See, for example, the work of Mary McIntosh, Jeffrey Weeks, John D'Emilio, Celia Kitzinger, Judith Walkowitz, Gary Kinsman, etc.

⁹⁵ S. Epstein, "Gay Politics, Ethnic Identity: The Limits of Social Constructionism" (1987) Vol. 17, 93-94 Socialist Rev. 9 at 17.

This is the assumption behind the phrase "sexual orientation" and the explanation of why this term is problematic for feminist theory. Equating lesbian and gay existence with same-sex sexual activity is reductionist and unpersuasive for at least two reasons. First, lesbianism can be expressed politically as well as personally. It may not be necessary to have intimate sexual relations with women in order to be a lesbian (self-definition plus the rejection of heterosexual privilege might suffice). Second, who has the power to define what sexual activity is? Marilyn Frye has suggested that under the criteria most heterosexuals (and gay men?) use to count the "times" they "have sex," lesbians don't have sex at all — "No male orgasms, no 'times'."⁹⁶ Our concept of sexual activity is as constructed and variable as are our understandings of family or rights.⁹⁷

Heterosexuality is problematic. As a set of dominant ideologies and enforced practices, heterosexuality is central to women's oppression.⁹⁸ Lesbianism thus becomes, not only the personal recognition of oppositional desire, it also constitutes political resistance to heterosexual hegemony. Political strategy must therefore focus on creating conditions that encourage this political understanding.⁹⁹

Immutability is a problem. While it may be true that a heterosexual's sexual identity is not easily changed, this is not due to an inherent sexuality, but to the context of enforced and privileged heterosexuality that denies people choice. Notions of immutability set the homosexual *and* the heterosexual in a mould that is politically reactionary in that it denies to heterosexuals the

⁹⁶ M. Frye, "Lesbian 'Sex'" (1988) 35 *Sinister Wisdom* 46 at 49.

⁹⁷ See also the discussion of Margrit Eichler's testimony in the *Karen Andrews* case, section II, *supra* at 791-93.

⁹⁸ See, for example, A. Rich, "Compulsory Heterosexuality and Lesbian Existence" in A. Snitow, ed., *Powers of Desire: The Politics of Sexuality* (New York: Monthly Review Press, 1983); C.A. MacKinnon, "Feminism, Marxism, Method, and the State: Towards a Feminist Jurisprudence" (1983) 8 *Signs* 635; S. Jeffreys, *Anticlimax: A Feminist Perspective on the Sexual Revolution* (London: The Women's Press, 1990); A. Brittan, *Masculinity and Power* (Oxford: Basil Blackwell, 1989).

⁹⁹ Of course, not all feminists problematize heterosexuality, there are some who defend their "right" to enjoy it.

agency to break out. A section 15 analysis not only leaves heterosexual relations intact, uninvestigated, and unproblematized, it also renders homosexual rights legitimate through liberal tolerance rooted in an ideology of innate sexuality.¹⁰⁰

Veysey v. Correctional Services of Canada,¹⁰¹ a case recently decided in the Federal Court, is typical. Here, a gay male prisoner applied for family visit privileges for his partner. The prison authorities denied his claim, stating that only heterosexual couples were included in the visitation program. Veysey asked the Federal Court to find this policy discriminatory under section 15, arguing that sexual orientation was an analogous ground. The trial court did so and further found this discrimination unjustifiable under section 1.¹⁰² On the one hand, this case is interesting because Veysey deliberately chose not to attempt to fit his relationship into a definition of family.¹⁰³ Instead, he argued the entire policy was heterosexually biased. Yet, in finding so, the court relied on essentialist immutability doctrine.¹⁰⁴ This is an effect of lesbian/gay rights claims with which feminists must engage.¹⁰⁵

Analogies are problematic: they require a simplification that inhibits an understanding of complexities and contradictions. But legal discourse is all about categorization, finding similar facts, and treating likes alike. The Supreme Court of Canada's analysis of section 15 of the *Charter* in *Law Society* insists that we continue to fit our lives into their terms of reference. This is, of course, the nature of struggling within the confines of legal form. Law is not

¹⁰⁰ The relationship between law, liberalism, and lesbian/gay consciousness will be further explored in my doctoral research. See also C. Kitzinger, "Liberal Humanism as an Ideology of Social Control: The Regulation of Lesbian Identities" in J. Shotter & K. Gergen, eds, *Texts of Identity* (London: Sage Publications, 1989).

¹⁰¹ *Veysey v. Correctional Services of Canada* (1989), [1990] 1 F.C. 321, 29 F.T.R. 74.

¹⁰² *Ibid.* at 331.

¹⁰³ *Ibid.* at 326.

¹⁰⁴ *Ibid.* at 329.

¹⁰⁵ *Veysey* has subsequently been affirmed on other grounds by the Federal Court of Appeal (31 May 1990, court file A-557-89). It appears from both this case and the *Mossop* appeal, *supra*, note 16, that the federal government is prepared to concede that "sexual orientation" is an analogous ground under section 15 of the *Charter*.

easily put to feminist use. Particularly in the area of sexuality, it is difficult to envision *Charter*/feminism compatibility. The lesbian and gay movement may find illuminating the lessons of feminist legal struggle learned thus far.¹⁰⁶ We may decide to "de-center" our engagement with law reform¹⁰⁷ and to develop alternative political strategies that spring from feminist theory and practice.¹⁰⁸

The intention of this paper was to address concerns that extend well beyond those of *Charter* litigation. Lesbian feminists need to develop ways of articulating our demands that reflect our political theory. We need to think about how to recognize and promote choice and agency, rather than undermine or ignore such significant parts of our politic.¹⁰⁹

Finally, there is the issue of whether potentially divergent strategies can live together. Does an explicit political challenge to enforced heterosexuality or the privileging of particular family forms implicitly contradict lesbian/gay marriage advocates? How can we "proselytize" about sexual choice and agency while lesbian and gay parents embroiled in custody battles must continue to insist that no such things exist? How can we justify our relationships by mirroring the heterosexual norm while our theory suggests lesbianism denies the norm its authenticity? Can we say "we are family" and "we are not family" at the same time?

Ultimately, these questions have to be worked on and worked out collectively. All I have attempted to do is raise some concerns about how we use law and about the changing ways we constitute and present ourselves. And it is important to acknowledge that it is the courage and commitment shown by many lesbian and gay rights fighters that allows the kind of debate contained within these pages to take place.

¹⁰⁶ See, for example, Smart, *supra*, note 33. See, also, Fudge, *supra*, note 59.

¹⁰⁷ See Smart, *ibid.* at 163.

¹⁰⁸ See *supra*, note 80.

¹⁰⁹ I am not arguing in favour of liberal notions of choice. Our ability to make choices and exercise agency is structurally constrained; my argument is about the need to promote oppositional theory.

